

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and	)	
BENNETT T. MARTIN,	)	
	)	FILED: April 30, 2001
Defendants.	)	

RESPONSE OF THE UNITED STATES TO  
SUPPLEMENTAL MOTION NUMBER ONE FOR PRODUCTION  
AND DISCOVERY PURSUANT TO RULE 16, FEDERAL RULES  
OF CRIMINAL PROCEDURE AND BRIEF IN SUPPORT THEREOF

I  
INTRODUCTION

Defendants have filed a *Supplemental Motion Number One for Production and Discovery Pursuant to Rule 16, Federal Rules of Criminal Procedure and Brief in Support Thereof* (“Motion”) which asks this Court: (1) to permit discovery by defendants “of any and all tangible objects or documents related in any way to this investigation;” and (2) to require the government to produce to the defendants and Court a listing or log of all documents withheld. Motion, p. 2. Defendants’ Motion should be denied.

First, the United States has met its obligations by providing all documents material to the defense or those that will be used by the United States in its case-in-chief. Second, defendants’ mis-characterization of the United States’ production is not what actually occurred in this case. Third, defendants’ request for all documents “related in any way to this investigation” amounts to a gross expansion of what is required by Federal Rule of Criminal Procedure 16. Fourth,

defendants have completely failed to meet their obligation to state with specificity any defects in the Rule 16 production made by the United States. Fifth, defendants' extraordinary request for a listing or log of all materials not produced is without authority. The United States has recognized and met its obligations under Rule 16. Nothing more is required.

## II

### THE UNITED STATES HAS SATISFIED ITS BURDEN UNDER RULE 16

#### A. BACKGROUND

A nationwide civil investigation of the magazine distribution industry was undertaken in the mid 1990s by the Antitrust Division. That investigation gathered documents and took depositions and interviews to try to determine whether the industry as a whole was operating in a manner that improperly suppressed other forms of competition. That investigation was closed without formal action.

An investigation was begun shortly thereafter into whether criminal violations had occurred by magazine wholesalers in the Dallas-Fort Worth area. That investigation was carried out by a Grand Jury sitting in Dallas, who returned the instant Indictment. In the course of the Grand Jury's investigation, documents were gathered from the three companies that distributed magazines in the Dallas-Fort Worth area as well as from certain retailers that bought those magazines for resale to the public. In addition, documents were gathered from other persons who were either interviewed or appeared before the Grand Jury in connection with the investigation, or who were associated with magazine distribution in the Dallas-Fort Worth area during the charged conspiracy period.

In addition to the Dallas Grand Jury investigation, other grand jury investigations were

begun into the magazine industry. The purpose of these other investigations is to determine if persons engaged in the wholesale distribution of magazines and other periodicals in other areas in the country have colluded with their competitors in violation of the federal antitrust laws or other related criminal statutes. In conjunction with these other investigations, documents have been gathered from relevant persons doing business in those other areas of the country. None of these other grand jury investigations concern the conspiracy alleged in the Indictment.

**B. THE GOVERNMENT’S RULE 16 PRODUCTION**

In making its Rule 16(a)(1)(C) production, the government already has disclosed to the defendants: (1) all of the documents in its possession from the three magazine wholesalers in the Dallas-Fort Worth area during the charged conspiracy period (i.e., Martin News, PMG/Trinity News and C&S News)<sup>1</sup>; (2) all of the documents in its possession from retailers operating in the Dallas-Fort Worth area during the charged conspiracy period; and (3) all of the documents in its possession produced by other persons associated with magazine distribution in the Dallas-Fort Worth area during the charged conspiracy period.<sup>2</sup> The United States also has disclosed to

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<sup>1</sup> In its response to the initial Rule 16 motion filed by the defendants, the government informed the defendants that it was going to produce only those documents of Trinity News’s parent company, Periodical Management Group (“PMG”), that related to the Dallas-Fort Worth area. This was because PMG operated magazine distribution companies in thirteen different geographic locations throughout the country. The government, however, reconsidered its position and in fact produced all PMG/Trinity News documents in its possession. This full production was made in January and February of 2001, consistent with the Court’s first amended scheduling order.

<sup>2</sup> In fact, the production is even broader than described above since many of the documents disclosed to defendants pursuant to Rule 16 concern time frames both earlier and later in time than the charged conspiratorial period (i.e., early August 1990 through October 30, 1995), as well as include geographic areas broader than the Dallas-Fort Worth area. While this production arguably went further than what is required under Rule 16 for purposes of this trial, it was simply easier to disclose all of the documents provided by these companies/individuals than to cull out documents that relate to the geographical and time period charged in the Indictment.

defendants documents gathered from ETD-Kromar, a marketing association in which Martin News was a member. It should also be noted that, pursuant to Rule 16, the United States' disclosure of documents to defendants included materials originally produced to the government by Martin News and PMG/Trinity News pursuant to the earlier civil investigation.

In fulfilling its discovery obligations, the United States complied with Rule 16(a)(1)(C), which provides:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Fed. R. Crim. P. 16(a)(1)(C) (emphasis added).

To the extent the defendants allege that the United States limited its production under Rule 16 to only those documents that it intends to use in its case-in-chief, defendants' assertion is flatly wrong. The requirements of Rule 16(a)(1)(C) are clearly spelled out in disjunctive form. Accordingly, the United States disclosed documents because they are either going to be used in its case-in-chief or because they are material to the preparation of the defense. If either criteria applied, the documents were produced. Defendants' suggestion that the United States has misread Rule 16 in some way is incorrect.<sup>3</sup>

Not all documents that relate to the magazine industry, however, have been turned over.

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<sup>3</sup> This is underscored by the fact that over 120 boxes were disclosed to defendants pursuant to Rule 16, far more than will ever be introduced into evidence by the United States.

As described earlier, this Indictment was the product of but one Grand Jury investigation, in Dallas, looking into anticompetitive conduct in the magazine industry. The other investigations concern other possible conspiracies and have nothing to do with the charged conspiracy. Thus, there are other documents that relate to the magazine industry in the possession and control of the United States. But they are not material to this trial because they do not concern the conspiracy charged in this Indictment. Instead, these other documents from other investigations relate to separate geographic areas, persons and time frames.

C. DEFENDANTS ASK THIS COURT TO ORDER  
DISCOVERY BEYOND WHAT IS REQUIRED UNDER RULE 16

The United States does not believe that documents from gathered from criminal investigations that do not involve the charged conspiracy are material to the defense in this case and has told defendants of this fact. Defendants, cognizant of the existence of these other documents, brazenly ask for broad discovery beyond the scope of the rules in order to access those documents. Their request should be denied.

It is well established that there is no general right to broad discovery in criminal cases. Weatherford v. Bursey, 429 U.S. 545, 549 (1977); United States v. Grier, 866 F.2d 908, 916-17 (7th Cir. 1989). Rather, discovery is limited to that set forth by the Federal Rules of Criminal Procedure. “[T]he constitution does not grant criminal defendants the right to embark on a ‘broad or blind fishing expedition among documents possessed by the government . . . .’” United States v. Mayes, 917 F.2d 457, 461 (10th Cir. 1990), cert. denied, 498 U.S. 1125 (1991), citing Jencks v. United States, 353 U.S. 657, 667 (1957).

Defendants ask this Court to rewrite Rule 16 by ordering the United States to produce all

documents and tangible objects “related in any way to this investigation . . . .” Motion, p. 2. The defendants’ standard -- “related in any way” -- is not the language of the rule. Rule 16 uses the word “material,” a term that has received close scrutiny over the years by courts examining the discovery issue. The Fifth Circuit, in rejecting a claim that more documents should be produced under Rule 16(a)(1)(C), said: “Materiality in this context requires ‘some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.’” United States v. Reeves, 892 F.2d 1223, 1226 (5th Cir. 1990) (quoting United States v. Ross, 511 F.2d 757, 763 (5th Cir. 1975)). Accord United States v. Maniktala, 934 F.2d 25, 28 (2nd Cir. 1991). See also United States v. Graham, 83 F.3d 1466, 1474 (D.C. Cir. 1996), cert. denied, 519 U.S. 1132 (1997). (“Under Rule 16, evidence is material if ‘there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, . . . or assisting impeachment or rebuttal.’” ((quoting United States v. Lloyd, 992 F.2d 348, 351 (D.C. Cir. 1993))). In no case has the word “material” been defined to read “related in any way to an investigation.” This Court should decline to so reword the rule.

D. DEFENDANTS HAVE FAILED TO SHOW THAT MISSING DOCUMENTS ARE MATERIAL

Rule 16(a)(1)(C) requires the government to produce all documents and other items that are material to the defense. In so doing, the Rule (“Upon request of the defendant the government shall . . . .”) places the initial determination as to what is material squarely on the government’s shoulders. The case law establishes that the defendant bears the burden of showing that the government has erred in its initial decision. United States v. Buckley, 586 F.2d 498, 506 (5th Cir. 1978) (“[I]t is incumbent upon a defendant to make a prima facie showing of

‘materiality’ in order to obtain discovery. . . .’); United States v. Carrasquillo-Plaza, 873 F.2d 10, 12 (1st Cir. 1989). Moreover, a defendant does not satisfy this burden by making a blanket, general request. Id.; United States v. Jackson, 850 F. Supp. 1481, 1503 (D. Kan. 1994) (“[T]he defendant must come forth with facts tending to show ‘that the Government is in possession of information helpful to the defense.’” (quoting United States v. Mandel, 914 F. 2d 1215, 1219 (9th Cir. 1990))).

Ignoring this precedent, defendants argue that they should be the ones to inspect the documents and determine what is material and what is not. Their position has no support in the law. Defendants are required to present facts or other evidence which support their claim that the government has failed to fulfill its discovery obligations under Rule 16. Not only have they failed to do so here; they have not even tried. Defendants have failed to identify any document or other tangible object which they believe should have been produced but was not. They also have failed to describe any categories or types of documents to which they think they are entitled. They have made no claim that documents belonging to a certain person or pertaining to a certain geographic region are missing. In short, defendants have not, as required under the law, presented any fact to support their claim that the United States has not fulfilled its Rule 16 obligations.<sup>4</sup>

E. DEFENDANTS’ EXTRAORDINARY  
REQUEST FOR A LOG MUST BE DENIED

Defendants expand their inappropriate production request with a startling request that the

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<sup>4</sup> Of course, should defendants make such a showing, the matter must then go to this Court for a decision, because nearly all of the other documents relating to the magazine industry and in the government’s possession were produced in response to compulsory process, either grand jury subpoenas or civil investigative demands. Thus, this Court will have to weigh the defendants “particularized need” for any requested documents against the secrecy considerations of the grand jury or the Antitrust Civil Process Act.

Court order the United States to produce a log or listing of all of the documents that were not turned over. The United States is aware of no case ordering such a log or listing.<sup>5</sup> There is no such provision in the Rules of Criminal Procedure. Defendants have no right to know the subject matter of other federal criminal or civil investigations of the magazine distribution industry where there is no connection with the criminal charge in this case. Nor can they be permitted to see a log or list of documents obtained by the government in the course of its investigation. Put simply, defendants' request amounts to little more than an end run around Fed. R. Crim. P. 6(e) and an attempt to override the overwhelming policy concern of keeping secret those matters which have occurred before the grand jury. Indeed, defendants' request amounts to little more than a license to rummage through confidential grand jury (and CID) materials in the hope that their fishing expedition may turn up something. Accordingly, this request must be denied.

### III CONCLUSION

This Motion is nothing but a fishing expedition. Defendants know that there is a broad universe of documents relating to multiple investigations of the magazine industry, and they know that they only received access to those documents that the government intends to offer in its case-in-chief or which are material to the preparation of the defense. Here, defendants have failed to raise any fact supporting their position that the government has not complied with Rule 16, and they cannot do so. Pursuant to Rule 16(a)(1)(C), the United States has disclosed to the defendants all of the documents it received from the three companies that distributed magazines in

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<sup>5</sup> One case, United States v. Leung, 40 F.3d 577, (2nd Cir. 1994), rejected a request to review materials inspected in camera by the Court, holding: "criminal defendants have no constitutional right to know the contents of Government files in order to present arguments in favor of disclosure." Id. at 583.



the Dallas-Fort Worth area during the charged conspiracy period, as well as from retailers who were their customers and other persons involved in magazine distribution in the Dallas-Fort Worth area during the charged conspiracy period. Because the United States has complied with its discovery obligations under Rule 16, this Court should deny defendants' Motion.

Respectfully Submitted,

SCOTT M. WATSON  
Chief, Cleveland Field Office

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"/s/"  
RICHARD T. HAMILTON, JR.  
Ohio Bar Number--0042399

MICHAEL F. WOOD  
District of Columbia Bar Number--376312

KIMBERLY A. SMITH  
Ohio Bar Number--0069513

SARAH L. WAGNER  
Texas Bar Number--24013700

Attorneys, Antitrust Division  
U.S. Department of Justice  
Plaza 9 Building, Suite 700  
55 Erieview Plaza  
Cleveland, OH 44114-1816  
Telephone: (216) 522-4107  
FAX: (216) 522-8332

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April, 2001.

Richard Alan Anderson, Esq.  
Burleson, Pate & Gibson, L.L.P.  
2414 N. Akard, Suite 700  
Dallas, TX 75201

Michael P. Gibson  
Burleson, Pate & Gibson, L.L.P.  
2414 N. Akard, Suite 700  
Dallas, TX 75201

“/s/”

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RICHARD T. HAMILTON, JR.